

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 64674
Issued to: Charles E. LUCAS

DECISION ON THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2528

Charles E. LUCAS

This appeal has been taken in accordance with 46 U.S.C. §7702 and 46 C.F.R. §5.701.

By an order dated 5 October 1990, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's License outright for three months with an additional suspension of six months remitted on six months probation upon finding proved the charge of violation of law. The charge was supported by two specifications of violating Rules 15 and 16 of the Inland Navigation Rules (33 U.S.C. §§2015, 2016)(hereafter "Rules").

The specifications found proved allege that Appellant, while the operator of the M/V LORIDIA DUFRENE and tow under the authority of the above-captioned license, did, on or about 29 May 1990, violate Rule 15 and 16, causing a collision with the M/V CAPTAIN HENRY INMAN and tow.

The hearing was held at Houston, Texas on 29 August 1990. Appellant was represented at the hearing by professional counsel. At the hearing, Appellant entered an answer of "deny" to the charge and specifications. The Investigating Officer offered into evidence 15 exhibits and the testimony of one witness. Appellant offered into evidence three exhibits and his own sworn testimony.

On 5 October 1990, the Administrative Law Judge issued the decision and order in which he determined that the charge and specifications had been proved, providing for the aforementioned suspension. The decision and order were served on Appellant on 9 October 1990. Appellant submitted a notice of appeal on 12 October 1990. A transcript of the proceedings was served on Appellant on 16 January 1991. Appellant subsequently perfected his appeal by filing an appellate brief on 14 March 1991. Accordingly, Appellant's appeal is timely and properly before the Vice Commandant for disposition.

FINDINGS OF FACT

At all times relevant, Appellant was serving under the authority of the above-captioned license issued by the Coast Guard as a third renewal on 28 February 1989. Appellant's license authorized him to serve as an operator of uninspected towing vessels.

On 29 May 1990, Appellant was the operator of the towing vessel M/V LORIDIA DUFRENE, pushing a tow of three loaded tank barges (lead barge: SFI-41) west on the Gulf Intracoastal Waterway (GICW) with a projected course (by turning starboard) north into the Houston Ship Channel. Proceeding south (outbound) in the Houston Ship Channel was the M/V CAPTAIN HENRY INMAN pushing a tow of two loaded barges (lead barge: HOLLYWOOD-2022). The vessels were approaching at approximately right angles. The operators of both towing vessels had agreed by radio to a port-to-port passing in the Houston Ship Channel.

At approximately 0850, Appellant attempted the starboard turn north (inbound) into the Houston Ship Channel. Appellant's attempted turn was too wide and his vessel travelled west of the buoy line marking the west side of the Channel. Consequently, Appellant's lead barge, the SFI-41, collided with the HOLLYWOOD-2022. Both barges incurred damage and approximately 260 barrels of Methyl Tert-Butyl Ether were spilled from the HOLLYWOOD-2022.

At the time of the collision, the weather was clear with good visibility and a strong flood tide.

Appearance: Lizbeth Tulloch, Esq. 470 Riviana Bldg., 2777 Allen Parkway, Houston, Tx 77091.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant asserts the following bases of appeal:

1. Appellant's due process rights were violated in that he was not "afforded notice that the [charge sheet] would be amended to include a violation of the Meeting Rule ("rule 14");"

2. The record fails to support by substantial evidence the finding of proved to the specification of violating the Crossing Rule, Rule 15;

3. The record fails to support by substantial evidence the finding of proved to the specification of violating the Give-way Rule, Rule 16;

4. The finding of the Administrative Law Judge that the violation of Rules 15 and 16 contributed to the collision is not supported by substantial evidence;

5. The Administrative Law Judge's order should be vacated or modified since the Administrative Law Judge relied on Rule 14 violations in determining the order and since Appellant had a prior clear record.

OPINION

I

Appellant asserts that his due process rights were violated because he was not afforded notice that the charge sheet "would be amended to include a violation of...Rule 14." Appellant also asserts inter alia that he was not afforded an opportunity to be heard regarding the amended charge and that "the Rule 14 charges were not found "proved" by a preponderance of the...evidence." I do not agree.

Appellant's assertions are misplaced with respect to the issue of Rule 14. It is true that the Administrative Law Judge did discuss Rule 14 in some detail as well as Rule 15 and 16. See, Decision and Order, p 14. However, the Administrative Law Judge clearly stated in his ultimate findings that only specifications of violating Rules 15 and 16 were found proved. See, Decision and Order, p 16. Accordingly, contrary to Appellant's assertion, the Administrative Law Judge did not find that Appellant violated Rule 14, notwithstanding that he had discussed all three Rules. The mere discussion and analysis of Rule 14 did not prejudice Appellant in any perceivable way, nor did it violate Appellant's rights to due process.

II

Appellant asserts that the record fails to support the finding of proved to the specification of violating Rule 15 (Crossing Rule). I do not agree.

Appellant also contends inter alia that the vessels intended to meet and pass port-to-port and that "whether a crossing situation exists depends upon the actual situation at the time when the necessity for precaution begins, and everything prior to that is immaterial..."

Appellant's vessel, M/V LORIDIA DUFRENE and the M/V CAPTAIN HENRY INMAN were essentially in a crossing situation when the collision occurred, notwithstanding that a port-to-port passing had

been agreed to. [TR 30, 151, 181, 197-198; I.O. Exhibit 5]. There is a risk of collision and the crossing rules apply if the vessels are approaching in crossing positions, even though one vessel may intend to turn into the same channel which the other vessel is transiting so that their respective intended courses would not, in the end, actually intersect. Appeal Decision 444 (TAYLOR) citing The Kingston, 173 Fed. 992 (D.C.N.Y. 1909); J. W. GRIFFIN, GRIFFIN ON COLLISION (1949), 116.

In the case herein, the risk of collision and concomitant crossing situation existed before Appellant commenced his starboard turn into the Houston Ship Channel due to the fact that the vessels were approaching the intersection of the Channel and the GICW at nearly right angles. This risk of collision continued after Appellant had commenced his turn due to Appellant's miscalculations as to speed, current and buoy position.

Under Rule 15, the M/V LORIDIA DUFRENE was the burdened (give-way) vessel, holding the M/V CAPTAIN HENRY INMAN on her starboard side. As the operator of the give-way vessel, it was incumbent on Appellant to keep his vessel out of the way of the M/V CAPTAIN HENRY INMAN. Rule 15 Appeal Decision 2218 (LASKI).

The record reflects that Appellant had transited this area many times, acknowledging that a very strong flood tide existed. [TR 173, 174]. However, Appellant failed to calculate the flood tide using the Tidal Current Tables. [TR 173]. Additionally, Appellant utilized Buoy No. 26 (in the Houston Ship Channel) for navigation knowing that Buoy No. 26 was in fact off station. [TR 174]. It is significant that Appellant could clearly see the M/V CAPTAIN HENRY INMAN and her tow approximately two miles before commencing the turn into the Houston Ship Channel (visible from GICW at Bolivar Peninsula). [TR 180; I.O. Exhibit 15]. It is also significant that Appellant's vessel had sufficient horsepower and maneuverability to navigate the waterway where the collision occurred, [TR 185].

"The timely options available to the [burdened] vessel are to keep out of the way by altering course to starboard, to slacken speed or stop or reverse, or to alter to port sufficiently to avoid passing ahead. Whatever action is taken it must be bold enough to be clearly understood by the other vessel." R. F. FARWELL, FARWELL'S RULES OF THE NAUTICAL ROAD (6th ed. 1982). The record reflects that Appellant took no decisive action to avoid the collision other than to continue his ineffective turn to starboard, reversing his vessel's engines less than two seconds before the collision. [TR 187]. In essence, Appellant's starboard turn into the Channel was too wide. His vessel and tow swung across the

Channel, colliding with the barge HOLLYWOOD-2022 on the west side of the Channel, clearly intruding into the other vessel's established downbound course. [TR 69-71, 197-199].

It is within the exclusive purview of the Administrative Law Judge to evaluate and weigh the evidence presented at the hearing. Unless that evidence is demonstrated to be inherently incredible, the findings will not be set aside. Appeal Decisions 2492 (RATH); 2390 (PURSER), affirmed sub non Commandant v. Purser, NTSB Order No. EM-130 (1986); 2344 (KOHAJDA); 2340 (JAFFE); 2333 (AYALA); 2302 (FRAPPIER); 2275 (ALOUISE); 2472 (GARDNER). In the case herein, the finding of proved to the specification of the violation of Rule 15 is supported by substantial, credible evidence. Accordingly, the finding of proved to the specification of the violation of Rule 15 will not be disturbed.

III

Appellant asserts that the finding of proved to the specification of the violation of Rule 16, the Give-way Rule, is not supported by "probative, reliable and substantial evidence." I do not agree.

Rule 16 provides that "every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear."

Under Rule 16...the give-way vessel is directed to take early and substantial action to keep well clear. The vessel to port in a crossing situation is allowed the following actions: turning to starboard, turning to port, or reducing speed to stopping or backing engines. The give-way vessel is enjoined to avoid crossing ahead.

FARWELL, supra, 148.

As explained in Opinion II, supra, Appellant failed to take the necessary actions to avoid colliding with the M/V CAPTAIN HENRY INMAN and her tow. Appellant's miscalculated turn, failure to adequately compensate for the strong flood tide and dependence on an off-station channel buoy directly caused the collision. Appellant himself testified that he had transited these particular waterways numerous previous times. Notwithstanding his familiarity, Appellant failed to take early and substantial action to keep out of the way of the other vessel and tow notwithstanding that he had full knowledge of the peculiar features of the intersection of the Houston Ship Channel and the GICW.

As stated in Opinion II, supra, the record provides substantial evidence of Appellant's failure to take adequate

measures to negotiate the turn into the Channel and avoid the collision. Accordingly, the finding of proved to the specification of the violation of Rule 16 will stand.

IV

Appellant asserts that the finding of the Administrative Law Judge that the violation of Rules 15 and 16 "contributed to cause" the collision is not supported by "probative" reliable and substantial evidence. I do not agree.

The aforementioned portions of the record clearly indicate that the failure of Appellant to effectively negotiate the starboard turn into the Houston Ship Channel directly caused the collision. The record reflects no evidence of action or omission by the M/V CAPTAIN HENRY INMAN that contributed to the collision. It is particularly noteworthy that the operator of the M/V CAPTAIN HENRY INMAN turned his vessel to starboard, west of the buoys marking the west side of the Channel, essentially giving Appellant most of the Channel in which to complete his turn. [TR 68-69, 178]. Under both Rules 15 and 16, it was the duty of Appellant to keep his vessel clear of the M/V CAPTAIN HENRY INMAN. Notwithstanding the actions of the M/V CAPTAIN HENRY INMAN's operator, Appellant still failed to safely navigate the turn into the Channel.

The record reflects that if not for Appellant's miscalculations and failure to properly navigate the turn into the Channel, there would not have been a collision. Accordingly, the finding of the Administrative Law Judge that Appellant's actions precipitated the collision will not be disturbed.

V

Appellant asserts that the order of the Administration Law Judge should be vacated or modified because the Administrative Law Judge relied on Rule 14 violations in determining the order. Additionally, Appellant asserts that he has a prior clear record.

As stated in Opinion I, supra, the mere fact that the Administrative Law Judge addressed Rule 14 and analyzed its application to the facts of the collision does not per se prejudice Appellant or mandate a modification of the order. It is particularly ironic that Appellant would argue that the Administrative Law Judge should not have addressed Rule 14 since Appellant himself urged that Rule 14 (Meeting Rule) should apply rather than Rule 15 (Crossing Rule). [TR 209-210; see also, post-hearing brief submitted by Appellant dated 4 Sept. 1990].

The thrust of the Administrative Law Judge's analysis regarding Rule 14 serves to demonstrate that although there was a passing agreement to address a Rule 14 meeting situation, a Rule 15 crossing situation existed in fact prior to and at the time of the collision. Decision & Order, 17-23. It would have been implausible for the Administrative Law Judge to responsibly discuss the application of Rule 15 and Appellant's contention of the application of Rule 14 without discussing both rules in some detail. The record supports the dictum of the Administrative Law Judge that "even if this be deemed a combination crossing situation developing into a meeting situation, the [Appellant] violated both statutory rules." However, the record reflects no reliance by the Administrative Law Judge upon Rule 14 and its application in determining that the charged violations of Rules 15 and 16 had been proved.

Additionally, the order imposed is neither unfair nor disproportionate. The order is within the suggested range of appropriate orders in 46 C.F.R. §5.569 (Table). Orders issued by the Administrative Law Judge are exclusively within his discretion unless obviously excessive or an abuse of discretion. Appeal Decision 2524 (TAYLOR); 2445 (MATHISON); 2422 (GIBBONS); 2391 (STUMES); 2362 (ARNOLD); 2313 (STAPLES). Here, the record reflects no abuse of discretion. The Administrative Law Judge's discussion of the consideration of a proper order is well reasoned and clearly reflects a proportionality to the violations. [decision & order, 29-30].

Appellant also asserts inter alia that under local custom and the special circumstances of the flood tide, the operator of the M/V CAPTAIN HENRY INMAN was under a duty to "hold up and wait for the inbound vessel (who is fighting the current, and is experiencing less maneuverability), to complete her turn." I do not agree.

The flood tide in the area of the intersection of the Houston Ship Channel and GICW is not a special circumstance but, on the contrary, is a common occurrence which Appellant admitted. [TR 173-174]. Rule 2(b) permits a departure from the Rules only when special circumstances make a departure from the Rules "necessary to avoid immediate danger." The record supports the finding of the Administrative Law Judge that the flood tide was not a special circumstance. Additionally, the flood tide created no immediate danger to Appellant's vessel. Appellant's own actions placed his vessel in extremis. Where such a situation is brought about by the actions of Appellant, deviation from the Rules is not permitted. Appeal Decisions 2358 (BUISSSET); 2359 (WAINE).

Based on the foregoing, the order will not be disturbed.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated on 5 October 1990 at Houston, Texas is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 30th day of July, 1991.